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nious and happy argument" presented therein, but for its "fairness and dignity," calculated, as the conclusion of the court is, "to maintain proper respect for the spirit of the national legislation in general, especially towards the state courts."

In holding that the ruling of the judge at *nisi prius*, rescinding the order for a removal of this cause before the intervention of a term of the federal court at which it would have been entered, was right in point of law and sound discretion, we do no more than declare, without arrogance or assumption, that, except by writ of error from the Supreme Court of the United States, whose judgment is conclusive upon all the judicial tribunals of the land, the jurisdiction of our own state courts is not to be reduced to "very inferior and insignificant proportions."

If the views which I have expressed are sustained by my brethren, the defendant's exceptions must be overruled.

CUSHING, C. J., and SMITH, J., concurred.

Supreme Court of Ohio.

JONES, STRANATHAN & CO. v. WILLIAM GREAVES.

On the trial of a civil action, wherein the claim or defence is based on an alleged fraud, the issue may be determined in accordance with the preponderance or weight of evidence, whether the facts constituting the alleged fraud do, or do not, amount to an indictable offence.

MOTION for leave to file a petition in error to the District Court of Muskingum county.

The original action was brought by William Greaves against Jones, Stranathan & Co., to recover a balance alleged to be due to the plaintiff for labor and materials in tin-roofing a storehouse of defendants under a special contract. The contract, as the plaintiff claimed, designated the material to be used as "the best quality of roofing-tin;" but the defendants claimed that the contract required "ix charcoal tin" to be used. The latter is the better quality of tin, and worth four dollars per box more than the former. The contract was entered into in this way: The defendants proposed for bids in writing, specifying the quality of the material to be furnished for the roof by the bidder; the plaintiff's bid was \$1100, which bid the defendants accepted and promised to pay. Afterward, the plaintiff purchased tin of the quality

known as "the best quality of roofing-tin;" whereupon the defendants objected to the use of this quality of tin, unless the plaintiff would agree to abate from the contract price four dollars per box of tin. The plaintiff agreed to the reduction and used the material so purchased in making the roof. Afterward the plaintiff refused to accept in payment less than the original contract price, on the ground that his agreement to abate the four dollars per box was obtained by the fraudulent acts and representations of the defendants. The fraud practised by the defendants, as claimed by the plaintiff, was thus: That after the making of the original contract, the defendants fraudulently altered the written proposal for bids, by inserting therein the words "ix charcoal tin," and afterwards induced the plaintiff to believe that the specification of materials, at the time plaintiff's bid was made, required the furnishing of the better and higher-priced quality of tin.

This question of fraud was put in issue by the pleadings, and testimony was offered, on the trial, tending to prove the issue on both sides.

The Court of Common Pleas was requested by the defendants to charge the jury that before they could find the defendants guilty of the fraud alleged, they must be satisfied from the evidence, beyond a reasonable doubt, that the fraud had been committed. This request the court refused to give, but did charge that a preponderance of evidence would be sufficient to prove the same. Exceptions were taken. Verdict and judgment were rendered for the plaintiff. On error, the District Court affirmed the judgment below; and the only matters assigned for error here relate to the refusal of the Common Pleas to charge as requested and to the charge as given.

Evans & Beard, for the motion.

M. M. Granger (with whom was *D. B. Gary*), contra.

The opinion of the court was delivered by

MCLVAINE, C. J.—There is no doctrine of the law settled more firmly than the rule which authorizes issues of fact in civil cases to be determined in accordance with the preponderance or weight of the evidence. The reason of the rule no doubt is, that as between man and man, where a loss must fall upon one or the other, it is right that the law should cast it upon him who is shown to have

been the cause of the loss, by proof establishing the reasonable probability of the fact.

But in criminal cases, where compensation for the injury done is not an element, the rule may well be, and is, different. In these cases, where the sole object of the prosecution is *punishment*, a humane principle is introduced, which requires that the guilt of the accused should be proved beyond a reasonable doubt. This principle is often expressed in the maxim, "It is better that ninety and nine guilty persons should go acquit, than that one innocent person should be punished."

It is claimed, however, by the plaintiffs in error (defendants below), that civil actions, wherein fraud amounting to a criminal offence is directly in issue, are excepted from the rule above stated; and that in such cases the rule of the criminal law applies. And they further claim, that the facts in issue in the case below, constituting the fraud alleged against them, amounted to the crime of forgery. Whether forgery could have been committed by altering the paper referred to in the pleadings, or whether the alteration alleged to have been made by the defendants below amounted to the crime of forgery, are questions we need not stop to answer, as we are satisfied, in any event, that the issue of fraud, as made in this case, did not take it out of the operation of the general rule applicable to the trial of civil issues. If there be any exception to the rule, of the kind claimed, it is limited to cases where it is necessary, in order to maintain the issue made, to prove that a crime was in fact committed; as, for instance, in justification of a slander imputing a crime.

We have no occasion now to question the existence of such limited exception, but I may be permitted to say that all argument and all authority are not in its favor. It was denied, with great reason, in *Munson v. Atwood*, 30 Conn. 102, an action under a statute, to recover treble damages for property *feloniously* taken and carried away.

We are aware that an exception to the rule, broader than we have stated it above, has been recognised in a few *insurance cases*: 16 Ohio 324; 2 Greenl. Ev., sect. 408. It has been held, however, to the contrary, in other well-considered cases: 1 Gray 529; 1 La. Ann. 216.

What the rule may be in *insurance cases* we need not now determine, further than to say that if there be no ground of distinc-

tion between them and other civil cases, it is extremely doubtful whether, as to them, there is any exception to the general rule ; as it is quite certain that an insurer may successfully defend, in an action on his policy, on the ground of gross or wilful misconduct on the part of the insured, which does not amount to criminal conduct.

We think it is going to the verge of the law, to hold that an issue of fact, in a civil case, must be proved beyond a reasonable doubt, even where a charge of crime is directly made, and where, also, it is necessary that it be made in order to sustain the claim or the defence ; as it is difficult to see how a person, who wrongs another without criminal intent, and is liable in damages on a mere preponderance of the evidence, can shelter himself from liability behind a reasonable doubt, by merely adding to the wrongful act a criminal purpose. Of course, we are not now speaking of those enormous crimes where all personal injury is merged in the public wrong ; nor do we intimate that in all civil actions the issues should be determined by a mere preponderance of the *testimony offered on the trial*, however slight. Where the facts charged involve moral turpitude, there is a presumption of innocence which stands as evidence in favor of the party charged ; and the more heinous the offence, the stronger the presumption. It is only where the testimony, when considered in connection with the presumptions of law arising in the case, preponderates in favor of the charge that its truth should be found ; but when so considered, by discreet and reasonable triers, the issue should be determined in accordance with the preponderance, although it may not be said that the proof has removed all reasonable doubts.

The conclusion, therefore, to which we have come, is this : that whatever may be the rule in civil cases, where the claim or defence can be established only by averment and proof that a crime has in fact been committed, in all other civil cases the issue should be determined by the weight or preponderance of the evidence, whether it be or be not sufficient to remove all reasonable doubts.

How, then, stands this case ? It was not necessary, in order to maintain the issue on his part, that the plaintiff below should have proved, nor was it necessary for him to aver in his pleadings, that the alteration in the written proposal for bids was a forgery within the meaning of the Crimes Act. Indeed the consequences of the alteration were the same to him and to his case, whether there was

or was not such a crime as forgery known to the criminal law. It was only material for him to show that the altered paper was fraudulently used by the defendants as a means to obtain from him a change in the contract. Whether the alteration had been innocently or feloniously made, was of no direct importance. The material question in issue was this: Did the defendants fraudulently obtain from the plaintiff the modification of the contract as subsequently agreed to by him?

This case comes within the principle decided in the case of *Strader v. Mulvane et al.*, 17 Ohio St. 624. There was no error in the refusal to charge, or the charge as given by the Court of Common Pleas. Motion overruled.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ILLINOIS.²

SUPREME COURT COMMISSION OF OHIO.³

ADMIRALTY. See *Collision*.

Cross-libel.—Where, in a suit in admiralty, a cross-libel and answer have been filed and a decree entered dismissing the cross-libel, such a decree, if not appealed from, is conclusive that the libellant in the cross-suit is not entitled to recover affirmative damages for any injuries received by his own vessel, but it does not preclude him from showing in the original suit, if he can, that a collision was the result of inevitable accident, or that it was occasioned by the negligence of those in charge of the other vessel, or that it was a case of mutual fault, where the damages should be divided: *Pitts, Executor, &c., v. River & Lake Shore Steamboat Line*, S. C. U. S., Oct. Term 1875.

AGENT.

Notice to, or knowledge by, an agent or a sub-agent is notice to, or knowledge by, the principal, but to make it so the notice or knowledge must come in the course of the principal's business, or from a prior transaction then present to the agent's mind, and which could be properly communicated to the principal: *Hoover v. Wise*, S. C. U. S., Oct. Term 1875.

But notice or knowledge on the part of an agent of an intermediate employer will not affect the principal: *Id.*

W., residing in New York and having a claim against a debtor in Ne-

¹ Prepared expressly for the American Law Register, from the original opinions. The cases will probably be reported in 1 or 2 Otto.

² From Hon. N. L. Freeman, Reporter; to appear in 77 Illinois Reports.

³ From E. L. De Witt, Esq., Reporter; to appear in 27 Ohio St. Reports.